

Law Offices

HOLLAND & KNIGHT

A Registered Limited Liability Partnership

2100 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20037-3202
202-955-3000
FAX 202-955-5564

Atlanta	Orlando
Boca Raton	St. Petersburg
Fort Lauderdale	Tallahassee
Jacksonville	Tampa
Lakeland	Washington, D.C.
Miami	West Palm Beach

MARVIN ROSENBERG
202-457-7147
mrosenbe@hklaw.com

February 28, 1997

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, D.C. 20554

RECEIVED
FEB 28 1997
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: In the Matter of Closed Captioning
and Video Description of
Video Programming
MM Docket No. 95-176

Dear Mr. Caton:

Transmitted herewith are an original and four copies of the comments of United States Satellite Broadcasting Company, Inc. with respect to the above indicated notice of proposed rulemaking.

Very truly yours,



Marvin Rosenberg
Counsel for United States
Satellite Broadcasting
Company, Inc.

mr:ik
Enclosure

No. of Copies rec'd
List ABCDE

0+4

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED
FEB 28 1997
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Closed Captioning and Video)
Description of)
Video Programming)

Implementation of Section 305 of the)
Telecommunications Act of 1996)

Video Programming Accessibility)
)
)
)

MM Docket No. 95-176

COMMENTS
of
UNITED STATES SATELLITE
BROADCASTING COMPANY, INC.

Dated:
February 28, 1997

Marvin Rosenberg
David Vaughan

Holland & Knight LLP
Suite 400
2100 Pennsylvania Ave., NW
Washington, DC 20037-3202
202-457-5921

Counsel for United States
Satellite Broadcasting
Company, Inc.

SUMMARY

United States Satellite Broadcasting Company, Inc.'s ("USSB") comments are generally limited to whether programmers who originate programs or the entities that deliver video programming directly to consumers should be responsible for compliance with the proposed closed captioning regulations; whether certain types of providers or programming should be exempt from the regulations; whether the proposed regulations are based upon overly optimistic assessments of the availability and the likely availability over the next eight years of competent personnel to provide quality captioning, particularly "stenocaptioners" for "real time captioning"; and whether the proposed recordkeeping requirements are necessary or unduly burdensome.

USSB believes that in many respects the proposed regulations are unnecessarily imposed upon providers and/or economically burdensome for providers of video programming and should be revised or eliminated. For this reason USSB urges that any responsibility for closed captioning should be imposed upon programmers rather than distributors. In addition, certain types of programs that are admittedly difficult to caption such as live programming should be exempt from captioning requirements. USSB also believes that the captioning industry and the Commission have seriously underestimated the effects upon programming posed by the small pool of competent captioners available to meet the requirements of the proposed regulations. Care therefore must be taken in imposing regulatory obligations based upon a belief that adequate captioning personnel are or are likely to be available

when and where they will be needed. Finally, the proposed recordkeeping requirements are onerous and unnecessary, requiring the addition of unnecessary staff and would be a financial burden on the nascent DBS industry.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

FEB 28 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Closed Captioning and Video)
Description of)
Video Programming)
)
Implementation of Section 305 of the)
Telecommunications Act of 1996)
)
Video Programming Accessibility)
)
)

MM Docket No. 95-176

COMMENTS
of
UNITED STATES SATELLITE
BROADCASTING COMPANY, INC.

United States Satellite Broadcasting Company, Inc. ("USSB") submits these comments in response to the Commission's Notice of Proposed Rulemaking ("Notice") adopted January 9, 1997 requesting comments on proposed closed captioning requirements.

USSB is a provider of high-power direct broadcast satellite ("DBS") subscription television programming to households throughout the continental United States. DBS operators like USSB are subject to proposed or actual FCC regulations such as access requirements for Federal political candidates, limitations on charges for advertising by political candidates and the requirement that high-power DBS providers reserve 4-7% of channel capacity for noncommercial programming of an educational and informational nature. DBS providers face intense competition from existing and

potential competitors, particularly cable and satellite operators with large installed customer bases.

USSB is dependent on third parties to provide it with high quality programming. Its existing programming agreements do not have provisions requiring that programmers to provide closed captioning. To the extent that its programmers include closed captions in their programming, USSB transmits those programs as they are received with closed captions.¹ USSB does not, however, attempt to superimpose closed captions on programs it secures from programmers who do not provide closed captioning because the programs are retransmitted as they are received. Importantly, were USSB to add closed captioning itself, USSB is concerned that it may violate the intellectual property rights of others. Finally, USSB could possibly subject itself to the uncertainties of defamation and other claims by third parties with respect to captioning, especially real-time captioning for news accounts or other live action programs.

USSB delivers "premium" network programming² and popular "basic" channels.³ In addition, USSB broadcasts news programming with the ALL NEWS CHANNEL and an increasing number of events and specials on a pay-per-view basis. It also provides a free channel

¹ Likewise, USSB broadcasts in Spanish all of the programming provided to it with a Spanish language soundtrack.

² These include Multichannel HBO, Multichannel SHOWTIME, Multichannel CINEMAX, and Multichannels THE MOVIE CHANNEL and FLIX.

³ These include MTV, VH-1, NICKELODEON/NICK AT NITE, COMEDY CENTRAL and LIFETIME.

which provides public service broadcasting as well as marketing messages. Beginning in 1995, for example, USSB began to expand into event programming, broadcasting heavyweight boxing matches, National Hot Rod Association events and the World Combat Championship. USSB continues to search for and broadcast event programming especially "niche" sports events such as cricket and World Cup soccer, entertainment and other specials such as Christmas celebrations from the Vatican, Easter and other religious programming, non-English Latin music performances, etc.

Many of these programs attract a small audience and could not be produced if production costs are increased. Yet, the diversity and quality of many of them is unquestioned. Thus, USSB has offered the Sundance Channel which is a 24-hour commercial-free television programming service under the creative direction of Robert Redford. The Sundance Channel offers independent films, including the works of emerging and established directors, exclusive television premiers and undiscovered cinema. The channel presents an extensive line-up of American features, documentaries, foreign and classic art films, experimental cinema, film shorts and animation.

BACKGROUND

Voluntary efforts of program producers and providers have achieved the current level of accessible programming for persons with hearing disabilities. Notice, para. 10. These efforts have received economic assistance from four primary sources. Id. No

similar economic support is provided to meet the requirements that may be imposed by regulation pursuant to Section 713.⁴

Currently, DBS providers typically offer subscribers programming originally produced for broadcast and cable distribution. Id., para. 11. The commercial broadcast networks generally are providing closed captions with the major exceptions being overnight news programs and regional sports feeds. The only exception mentioned in the Notice are the 1995 and 1996 NCAA Men's Basketball tournaments. However, even those relative large audience tournaments required joint efforts with funding and captioning agency partners. Notice, para. 13 and note 35. As noted, USSB broadcasts all closed captioning transmitted to it by those from which it obtains programming.

The current cost of closed captioning according to the Notice depends in part upon the type of programming with prerecorded programming ranging from \$800-2500 per hour (Notice, para. 18); live, unscripted programming (news, public affairs, sports, awards shows, etc.), \$120-1200 (Notice, para. 20) using "stenocaptioners"; electronic newsroom captioning, \$2500-5000 (Notice, para. 21); and reformatting for redistribution, \$120-750 (Notice, para. 22).

⁴ USSB has a limited operating history, having been in its development stage as recently as July, 1994. During its limited operating history, USSB has incurred net losses which on an annual basis have ranged from \$4.1 million to \$75.7 million. These losses are attributable to the significant costs incurred to develop and implement its business plan and to establish USSB in the high-power DBS market.

The availability of captioning resources depends on whether off-line captioning or real-time captioning is required. Notice, para. 23. For example, it is estimated that there are only 100 real-time captioners available today. Notice, para. 24. Moreover, they are not available on short notice or in all locations within the United States. The availability of fluent foreign language captioners is even more severely limited within the United States and abroad where many "niche" programs originate.

With respect to the timing for implementation of non-exempt video programming, the Commission has recognized that limitations do exist: these include the number of available captioners and captioning services, the costs of captioning and the effect that captioning may have on the continued availability of certain types of programming. Notice, para. 40. The Commission has proposed phase-in periods of eight and ten years as a consequence. Notice, paras. 31-62.

I. Responsibility for Captioning.

DBS, broadcast, wireless and cable providers all agree that it would be burdensome and inefficient to require that captions be added at the distribution level. Notice, para. 27. The Notice candidly admits "from a practical standpoint, that closed captioning is most efficient at the production stage." Notice, para. 6. Moreover, Congress itself reached the same conclusion. *Id.* Nevertheless the proposed regulations would place the obligation to comply with the rules on video programming providers because "a provider can refuse to purchase programming

that is not closed captioned" and because the "direct link between consumers and their video providers" will help ensure compliance. Id. at para. 28.

This solution, while simple on its face, ignores not only industry and Congressional conclusions but a host of problems and would impose an unnecessary layer of regulation upon providers. This is ironic given that the Telecommunications Act of 1996 was intended to accelerate deregulation of telecommunications markets as well as the deployment of advanced telecommunications and information technologies. USSB believes that any regulatory burden or responsibility should be placed with the entity most capable of providing the service efficiently. It misplaces the regulatory burden by making a provider legally responsible for the actions of firms that it does not control and cannot currently contractually require to provide closed captioning. With respect to political advertisements and political programming generally, USSB is concerned that unauthorized captioning may violate political rights of speech and expression and would be inconsistent with Section 315 of the Communications Act. Moreover, USSB is concerned that it may violate the intellectual property rights of programmers, program owners or others if it unilaterally interprets the works of a third party by providing closed captions.⁵ In this regard, USSB notes

⁵USSB is concerned that inadequate attention, if any, has been paid to the question whether requiring providers to superimpose closed captioning upon copyrighted programming will expose providers to liability for damages. For this reason, USSB further believes that any responsibility for closed captioning should be imposed upon programmers and owners of programming who are in a better position to deal with this issue.

that the Commission itself is currently unwilling to deal with the non-technical issues of captioning quality and accuracy. Notice, paras. 111. Why impose that liability upon providers?

In the event that liability for compliance is placed upon providers, the Commission should consider a rule exempting providers from liability for defamation, infringement of intellectual property rights, and other private liability with respect to the good faith provision of closed captioning.

Imposing responsibility for captioning upon providers will adversely affect the diversity of programming made available by DBS providers. For example, the "niche" programming that USSB currently provides for foreign sports such as cricket and soccer may become too costly to produce or production may become impossible particularly for broadcasts originating outside the United States because of the unavailability of competent captioners on site. Frequently, these programs are narrow in terms of the viewing audience and do not generate sufficient revenue to justify additional costs. In some cases, such as the Sundance Channel, the programmer may not have the resources to caption without voluntary funding which is not always available. Thus, as the Commission points out, relatively more popular regional college basketball tournament programs have required voluntary funding by third parties. Notice, para. 13 and note 35.

USSB believes that programmers should be responsible for providing any required captioning and that providers should only be

responsible⁶ for transmitting captioning as provided by programmers.⁷ In any event, programmers must be at least jointly responsible for compliance with the proposed regulations in the event that providers are unable by contract or otherwise to persuade programmers to provide captioning as presently contemplated or as may be required in the future. Otherwise, programmers are likely to play providers off against one another and/or refuse to provide certain types of programming while concentrating on other more easily captioned programming.

II. Exemptions of Programming and Providers Based on Economic Burden.

Section 713(d)(1) provides for an exemption from regulation for programming or services based upon "economic burden" to the providers or owners of such programming or services.⁸ The Commission believes that the "economic burden" standard permits it to exempt programming or services where the burden of captioning outweighs the benefits of captioning and the complexity of captioning. Notice, para. 70. Although the Notice states that the

⁶ To the extent that providers originate programming, they should bear responsibility for non-exempt programming as programmers.

⁷ The Commission notes that it might be more feasible to make a broadcast station responsible for captioning its programs that are re-broadcast by a MVPD, such as a DBS provider, rather than the MVPD. Notice, para. 44.

⁸ Since the economic burden of these provisions is relatively common to providers of video programming, the Commission should eliminate these burdens by rulemaking rather than attempting to exempt individual providers on a case-by-case as provided by Section 713 (d)(3) under an "undue burden" standard.

legislative history does not define "economic burden," ⁹ the House set forth some but not all factors which the Commission should consider:

"(1) the nature and cost of providing closed captions; (2) the impact on the operations of the program provider, distributor, or owner; (3) the financial resources of the program provider, distributor, or owner and the financial impact of the program; (4) the cost of the captioning, considering the relative size of the market served or the audience share; (5) the cost of the captioning, considering whether the program is locally or regionally produced and distributed; (6) the non-profit stature of the provider; and (7) the existence of alternative means of providing access to the hearing impaired, such as signing."

Conference Report, 104th Congress 2d Sess., Report 104-458 at 183.

The Notice also states that a Section 713(d)(1) exemption may be made "only" where the requirement to provide closed captioning would be economically burdensome for the "entire class." Notice, para. 70. This is plainly wrong. Section 713(d)(1) does not even mention "classes of programmers or providers." Section(d)(1) is not even limited to classes of programs. The provision in fact speaks to exempting "programs, classes of programs, or services...[which] would be economically burdensome to the provider or owner of such programming." To the extent that the Commission's proposals have been based upon the understanding that an exemption can be granted only where each member of a class is

⁹ Section 713(e) provides a definition of "undue burden" which applies to the undue burden standard of Section 713(d)(3) for providing a case-by-case exemption from the regulations ultimately issued by the Commission. This provision should not be used limit or narrowly define the "economically burdensome" standard to be used in promulgating the regulations themselves.

economically burdened or a limited definition of economic burden, those proposals should be analyzed anew.

A. Programming Exemptions.

USSB believes a variety of programming should be exempt from the regulation. USSB also thinks that, where most exemptions are necessary, it does not make a difference whether the programming is pay-per-view or not. USSB therefore believes strongly that no distinction should be made that discriminates between pay-per-view and other forms of reception.

USSB agrees that interstitials and other short form material should be exempt from the closed captioning requirements for the reasons stated in the Notice at paragraph 79. In addition, overnight news feeds and other programming that attract a small audience should also be exempt from closed captioning. These would include "niche" sports and other entertainment events narrowly targeted to meet the viewing tastes of a limited audience, particularly where there is a limited residual market for the broadcast or a limited window of time for re-broadcast. With respect to live programming, providers should be exempt from responsibility if any is imposed. In general, USSB believes that live programming should not be subject to closed captioning.

USSB believes that exemptions should consider relative market size for a program, class of program or service, the degree of distribution, audience ratings or share, relative programming budgets, and/or lack of or limited repeat value of programs. USSB also believes that the nature and cost of providing closed captions

and the impact upon operations of providers as well as programmers and owners should be considered.

With respect to foreign language programming, it should be self-evident that the availability of fluent captioners will be even less than the admittedly limited supply of English language captioners, especially stenocaptioners. USSB believes that requiring foreign language captioning is likely to affect adversely the availability of such programming because of the cost, liability and insufficient availability of fluent captioners. USSB is also concerned that the transmission of programs simultaneously in two languages may not be technically feasible if closed captions are also required. Thus, it is possible that programs that are currently transmitted in both English and Spanish may need to be limited to only one language if closed captions are required.

USSB agrees that programming that is primarily textual in nature should not be required to provide captioning.

Like PEG programming required of cable providers, high-power DBS providers are required to provide noncommercial programming of an educational or informational nature. These programs typically operate on a relatively small production budget. Closed captioning is likely therefore to place a too heavy burden on producers of these programs. For this reason alone, such programming should be exempt from regulation.

With respect to advertising, USSB believes that providers should have no responsibility for providing captioning because the quality of such captioning could adversely affect significant

commercial relationships. USSB believes that market forces will come to play that will cause advertisers to provide captioning in their own self interest.

USSB agrees that responsibility for political advertising should not be imposed on providers for the reason that it might be a form of censorship, particularly charged with questions of subjective quality and partisanship. If closed captions are required, they should be the sole responsibility of those persons sponsoring the advertising rather than the provider.

With respect to music programming, USSB does not believe that all such programs should be captioned, particularly live musical performances. In particular, live musical programs with small audiences and limited interest are not likely to afford the costs of captioning.

USSB agrees for the reasons stated in paragraph 66 of the Notice that sports in general should be exempt from captioning and that if captioning is required that it be the sole responsibility of the program producer. With respect to regional and niche sports, especially those transmitted from foreign countries, USSB is particularly concerned that these events be exempt. There are a number of technical reasons for this, including the fact that it is impractical to have a captioner for a soccer game in Sri Lanka for one game and then have the captioner at another such event in a different country shortly thereafter without regard to the obvious language and cost issues. These sports events are highly perishable with little residual value. Thus, even when transmitted

live and rebroadcast again within a few days in some cases, there is insufficient value to support the added costs of closed captioning.

With respect to existing contracts, USSB believes, in the event that providers are made responsible for compliance, existing contracts for programming that do not require closed captioning should be exempt for the life of the contract subject to the programmer agreeing to provide closed captioning sooner. See Notice, para. 88.

In the event that programmers are made responsible for compliance with the proposed regulations, USSB believes that providers should transmit closed captioning as transmitted by programmers whether the provider's contracts require captioning or not.

B. Library Programming.

USSB agrees that the statute does not require that all library programming be captioned. Obviously, there is an enormous volume of older programming, including classic movies and television series, of varying popularity and appealing to a diverse, often limited audience. To require an arbitrary percentage of such programming to be captioned would inevitably cause much of it to be lost to future viewers. USSB believes that the market will best determine whether there is sufficient interest for captioning such material and that the Commission should impose no requirement at this time, electing to monitor this situation with a view to a subsequent rulemaking if indicated by experience.

Otherwise, as with programming generally, the responsibility for captioning should reside with the owners of such programming and such programming should be exempt from regulation depending on such standards as anticipated audience size, programming budgets, foreign language issues, whether offered to meet non-commercial programming of an educational or informational nature, etc.

C. Provider Exemptions.

The Notice proposes not to exempt "any class of provider since all classes of providers appear to have the technical capability to deliver closed captions to their viewers intact." Notice at para. 6. Whether a class of providers has the technical capability or not is not the test for applying the "economic burden" standard of Section 713(d)(1). In order to conform to the "economically burdensome" provision of Section 713(d)(1) with respect to providers that the Commission must consider factors other than technological availability. Thus, in deciding whether providers should be responsible for compliance with the proposed regulations rather than programmers, the Commission must consider whether imposing the economic burden of captioning upon a nascent industry such as DBS providers (particularly firms that have a history of net operating losses) is reasonable.

III. Availability of Captioning Personnel.

Throughout the Notice, the Commission recognizes the limited availability for the foreseeable future of competent captioning personnel. E.g., Notice, paras. 23-25, 112. While the Commission appears to be taking this critical factor into

consideration throughout the rulemaking, USSB wishes to reemphasize how critical this issue is to resolving almost every issue posed by the Notice.

In particular, the Commission should be aware that the most likely location for DBS providers to insert captions for live programming will be at DBS uplink facilities. These facilities are located primarily to take advantage of prevailing weather conditions and are often at remote locations. Thus, they are not likely to be locations where already scarce captioners reside.

IV. Standards for Accuracy and Quality.

The Commission points out numerous reported problems associated with the accuracy or quality of closed captioning. Notice, paras. 103-109. USSB agrees that voluntary standards should be required rather than mandated, particularly at this time. However, USSB reiterates its concern that imposing responsibility for compliance upon providers may expose providers to claims of censorship, infringement, defamation, and other legal liability. For this reason, USSB continues to urge that any responsibility for compliance be placed upon programmers and/or shared by programmers. Otherwise, the Commission should exempt providers by express rule from liability to private parties for claims of censorship, defamation, infringement or other similar claims raised by reason of providers' originating or transmitting closed captions.

USSB does agree that providers should be responsible for the transmission of the captioning, including monitoring equipment and signal transmission of the captioning provided to them by

programmers, other broadcasters, etc. to insure that such captioning reaches consumers. See Notice, para. 110. Thus, extension of Section 76.606 of the Commission's rules in this regard currently appears appropriate.

V. Enforcement and Compliance Requirements.

In addition to requiring documentation by complainants, the Commission seeks comment on alternative methods or information needed to verify compliance. Notice, para. 124. One suggested alternative method would be to require each entity responsible for compliance to retain a public file with sufficient records to verify compliance, particularly with respect to the amount of closed caption programming distributed.

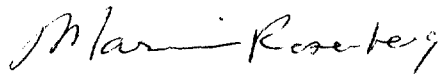
Since USSB does not believe that a provider should be responsible for non-exempt programming that it rebroadcasts but does not create, USSB believes that requiring it to maintain records would be unnecessary and unduly burdensome. As previously noted, captioning is accomplished more efficiently by programmers and they can more efficiently and meaningfully respond to complaints of the public and/or the Commission.

USSB believes that programmers and those that provide captioning are more likely to be responsive to complainants, particularly as to the inevitable questions concerning accuracy and quality. In any event, rather than imposing additional recordkeeping requirements upon providers, the Commission should leave it to individual providers' discretion to maintain those records, if any, a provider believes necessary to demonstrate

compliance with the regulations as issued and to resolve any disputes that may arise thereunder. See Notice, para. 150.

If recordkeeping is deemed necessary after a period of actual experience with the ultimate regulations, USSB believes a subsequent rulemaking in light of that experience would result in more reasonable and less onerous requirements than any imposed at this time without the benefit of experience.

Respectfully submitted:



Marvin Rosenberg
David Vaughan

Holland & Knight LLP
Suite 400
2100 Pennsylvania Ave., NW
Washington, DC 20037-3202
202 457 5921

Counsel for United States Satellite
Broadcasting Company, Inc.

February 28, 1997
WAS1-239632